STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE APPLICATION
FOR A LICENSE TO PRACTICE
MEDICINE AND SURGERY OF

PAUL B. HASER, M.D.,

Applicant

FINAL DECISION AND ORDER

The parties to this proceeding for the purposes of Wis. Stats. sec. 227.53 are:

Paul B. Haser, M.D.
504 East 63rd Street
New York, NY 10021

Medical Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, Wisconsin 53708

Department of Regulation & Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

A hearing was conducted in the above-captioned matter on June 2, 1989. John R. Zwieg, Attorney at Law, appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. The applicant, Paul B. Haser, M.D., appeared in person, without legal counsel.

The Administrative Law Judge filed her Proposed Decision in the matter on July 20, 1990, and the board initially considered the matter on August 23, 1990. The board at that time decided to table the matter until the following month to permit the parties an appearance before the board for the purpose of clarifying the record. Dr. Haser thereafter asked for further adjournment to permit his appearance before the board in the Spring of 1991. The parties appeared before the board at its meeting of May 24, 1991, and the board thereafter again tabled the matter for the purpose of giving Dr.

Haser the opportunity to decide whether he wished to withdraw his application until such time as he has some reason to renew his application for licensure in Wisconsin. By letter date July 22, 1991, Dr. Haser requested that his application be withdrawn, and the board further considered the matter at its meeting of August 22, 1991.

Based upon the entire record in this matter, the board makes the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. Paul B. Haser, M.D., P.O. Box 06-7724, Chicago, Illinois 60606, filed an application for a license to practice medicine and surgery with the Medical Examining Board, on or about September 29,1988.

2. The Medical Examining Board, on or about December 8, 1988, denied Dr. Haser's application for a license to practice medicine and surgery.

3. At least from July 1, 1987 to on or about December 18, 1987, applicant participated in a general surgery residency program at Tripler Army Medical Center in Honolulu, Hawaii.

4. In June, 1988, Paul B. Haser, M.D., upon a plea of guilty, was convicted of one count of indecent exposure and three counts of indecent assault by a military courts-martial convened in Hawaii, pursuant to Article 134 of the Uniform Code of Military Justice (10 USC sec. 934).

5. The crimes upon which Dr. Haser was convicted are substantially related to the practice of medicine and surgery, thereby constituting unprofessional conduct within the meaning of sec. 448.06 (2), Wis. Stats., and sec. MED 10.02 (2)(r) Wis. Adm. Code.

6. By letter dated July 22, 1991, Dr. Haser requested that he be permitted to withdraw his application for a license to practice medicine and surgery in Wisconsin.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this matter pursuant to sec. 448.02, 448.05 (1)(a), and 448.06 (2) Wis. Stats.

2. In having been convicted of the crimes set forth in the Findings of Fact,

the applicant, Paul B. Haser, M.D., has a conviction record.

3. In having been convicted of the crimes set forth in the Findings of Fact, the applicant, Paul B. Haser, M.D., has been convicted of crimes, the circumstances of which substantially relate to the practice of medicine and surgery.

4. In having been convicted of the crimes set forth in the Findings of Fact, the applicant, Paul B. Haser, M.D., has engaged in unprofessional conduct within the meaning of sec. 448.06 (2) Wis. Stats., and sec. MED 10.02 (2)(r) Wis. Adm. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that the petition of Paul B. Haser that he be permitted to withdraw his application for a license to practice medicine and surgery in Wisconsin be, and hereby is, granted.

EXPLANATION OF VARIANCE

The board has adopted the Proposed Decision of the Administrative Law Judge in its entirety with two exceptions. First, the board has added one Finding of Fact reflecting that Dr. Haser requested that he be permitted to withdraw his application prior to the board's final consideration of the matter. Second, in light of the board's decision to grant the petition to withdraw the application, the ALJ's recommendation that the application be denied has been replaced by the board's order granting the petition. Should Dr. Haser decide that he wishes to reapply for licensure in Wisconsin in the future, the board will be happy to undertake an evaluation of his rehabilitative status at that time. In the meantime, the board concludes that as the moving party in this proceeding, Dr. Haser has discretion to terminate the proceeding prior to the board's consideration of his rehabilitative status, and to leave that question for another day.

Dated this 4 day of September, 1991.

STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

by Michael P. Mehr M.D.
Michael P. Mehr, M.D.
Secretary

WRA:BDLS2:735

NOTICE OF APPEAL INFORMATION

(Notice of Rights for Rehearing or Judicial Review, the times allowed for each, and the identification of the party to be named as respondent)

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Medical Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Medical Examining Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Medical Examining Board.

The date of mailing of this decision is September 6, 1991.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be a prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3) (e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

(2) The filing of a petition for rehearing shall not suspend or delay the effective date of the order, and the order shall take effect on the date fixed by the agency and shall continue in effect unless the petition is granted or until the order is superseded, modified, or set aside as provided by law.

(3) Rehearing will be granted only on the basis of:

(a) Some material error of law.

(b) Some material error of fact.

(c) The discovery of new evidence sufficiently strong to reverse or modify the order, and which could not have been previously discovered by due diligence.

(4) Copies of petitions for rehearing shall be served on all parties of record. Parties may file replies to the petition.

(5) The agency may order a rehearing or enter an order with reference to the petition without a hearing, and shall dispose of the petition within 30 days after it is filed. If the agency does not enter an order disposing of the petition within the 30-day period, the petition shall be deemed to have been denied as of the expiration of the 30-day period.

(6) Upon granting a rehearing, the agency shall set the matter for further proceedings as soon as practicable. Proceedings upon rehearing shall conform as nearly may be to the proceedings in an original hearing except as the agency may otherwise direct. If in the agency's judgment, after such rehearing it appears that the original decision, order or determination is in any respect unlawful or unreasonable, the agency may reverse, change, modify or suspend the same accordingly. Any decision, order or determination made after such rehearing reversing, changing, modifying or suspending the original determination shall have the same force and effect as an original decision, order or determination.

227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except for the decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125, decisions of the department of employe trust funds, the commissioner of banking, the commissioner of credit unions, the commissioner of savings and loan, the board of state canvassers and those decisions of the department of industry, labor and human relations which are subject to review, prior to any judicial review, by the labor and industry review commission, and except as otherwise provided by law.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) 1. Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. If the agency whose decision is sought to be reviewed is the tax appeals commission, the banking review board or the consumer credit review board, the credit union review board or the savings and loan review board, the petition shall be served upon both the agency whose decision is sought to be reviewed and the corresponding named respondent, as specified under par. (b) 1 to 4.

2. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency.

3. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59 (6) (b), 182.70 (6) and 182.71 (5) (g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. The petition may be amended, by leave of court, though the time for serving the same has expired. The petition shall be entitled in the name of the person serving it as petitioner and the name of the agency whose decision is sought to be reviewed as respondent, except that in petitions for review of decisions of the following agencies, the latter agency specified shall be the named respondent:

1. The tax appeals commission, the department of revenue.

2. The banking review board or the consumer credit review board, the commissioner of banking.

3. The credit union review board, the commissioner of credit unions.

4. The savings and loan review board, the commissioner of savings and loan, except if the petitioner is the commissioner of savings and loan, the prevailing parties before the savings and loan review board shall be the named respondents

(c) A copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record. A court may not dismiss the proceeding for review solely because of a failure to serve a copy of the petition upon a party or the party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes of review in the agency's decision under s. 227.47 or the person's attorney of record.

(d) The agency (except in the case of the tax appeals commission and the banking review board, the consumer credit review board, the credit union review board, and the savings and loan review board) and all parties to the proceeding before it, shall have the right to participate in the proceedings for review. The court may permit other interested persons to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition.

(2) Every person served with the petition for review as provided in this section and who desires to participate in the proceedings for review thereby instituted shall serve upon the petitioner, within 20 days after service of the petition upon such person, a notice of appearance clearly stating the person's position with reference to each material allegation in the petition and to the affirmance, vacation or modification of the order or decision under review. Such notice, other than by the named respondent, shall also be served on the named respondent and the attorney general, and shall be filed, together with proof of required service thereof, with the clerk of the reviewing court within 10 days after such service. Service of all subsequent papers or notices in such proceeding need be made only upon the petitioner and such other persons as have served and filed the notice as provided in this subsection or have been permitted to intervene in said proceeding, as parties thereto, by order of the reviewing court.

BEFORE THE STATE OF WISCONSIN
MEDICAL EXAMINING BOARD

IN THE MATTER OF THE APPLICATION FOR A LICENSE TO PRACTICE MEDICINE AND SURGERY	:	NOTICE OF FILING PROPOSED DECISION
PAUL B. HASER, M.D., APPLICANT.	:	

TO: Paul B. Haser, M.D.
P.O. Box 06-7724
Chicago, IL 60606

John Zwieg
Attorney at Law
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Medical Examining Board by the Hearing Examiner, Ruby Jefferson-Moore. A copy of the Proposed Decision is attached hereto.

If you are adversely affected by, and have objections to, the Proposed Decision, you may file your objections, briefly stating the reasons and authorities for each objection, and argue with respect to those objections in writing. Your objections and argument must be submitted and received at the office of the Medical Examining Board, Room 176, Department of Regulation and Licensing, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before July 30, 1990.

The attached Proposed Decision is the examiner's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision together with any objections and arguments filed, the Medical Examining Board will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 20th day of July, 1990.

Ruby Jefferson-Moore
Ruby Jefferson-Moore
Hearing Examiner

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE APPLICATION FOR A LICENSE TO PRACTICE MEDICINE AND SURGERY	:	PROPOSED DECISION
PAUL B. HASER, M.D., APPLICANT.	:	

The parties to this proceeding for the purposes of Wis. Stats., sec. 227.53 are:

Paul B. Haser, M.D.
P.O. Box 06-7724
Chicago, Illinois 60606

Medical Examining Board
1400 East Washington Avenue
P.O. Box 8935
Madison, Wisconsin 53708

A hearing was conducted in the above-captioned matter on June 2,1989. John R. Zwieg, Attorney at Law, appeared on behalf of the Department of Regulation and Licensing, Division of Enforcement. The applicant, Paul B. Haser, M.D., appeared in person, without legal counsel.

Based upon the record herein, the examiner recommends that the Medical Examining Board adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Paul B. Haser, M.D., P.O. Box 06-7724, Chicago, Illinois 60606, filed an application for a license to practice medicine and surgery with the Medical Examining Board, on or about September 29,1988.

2. The Medical Examining Board, on or about December 8, 1988, denied Dr. Haser's application for a license to practice medicine and surgery.

3. At least from July 1, 1987 to on or about December 18, 1987, applicant participated in a general surgery residency program at Tripler Army Medical Center in Honolulu, Hawaii.

4. In June, 1988, Paul B. Haser, M.D., upon a plea of guilty, was convicted of one count of indecent exposure and three counts of indecent assault by a military courts-martial convened in Hawaii, pursuant to Article 134 of the Uniform Code of Military Justice (10 USC sec. 934).

5. The crimes upon which Dr. Haser was convicted are substantially related to the practice of medicine and surgery, thereby constituting unprofessional conduct within the meaning of sec. 448.06 (2), Wis. Stats., and sec. MED 10.02 (2)(r) Wis. Adm. Code.

CONCLUSIONS OF LAW

1. The Medical Examining Board has jurisdiction in this matter pursuant to sec. 448.02, 448.05 (1)(a), and 448.06 (2) Wis. Stats.

2. In having been convicted of the crimes set forth in the Findings of Fact, the applicant, Paul B. Haser, M.D., has a conviction record.

3. In having been convicted of the crimes set forth in the Findings of Fact, the applicant, Paul B. Haser, M.D., has been convicted of crimes, the circumstances of which substantially relate to the practice of medicine and surgery.

4. In having been convicted of the crimes set forth in the Findings of Fact, the applicant, Paul B. Haser, M.D., has engaged in unprofessional conduct within the meaning of sec. 448.06 (2) Wis. Stats., and sec. MED 10.02 (2)(r) Wis. Adm. Code.

ORDER

NOW, THEREFORE, IT IS ORDERED that the license application of Paul B. Haser, M.D., to practice medicine and surgery, be and hereby is **DENIED.**

OPINION

I. PROCEDURAL OVERVIEW

The applicant, Paul B. Haser, M.D., filed an application with the Medical Examining Board on or about September 29, 1988, for a license to practice medicine and surgery (Exhibit #1). The Board denied the application on December 8, 1988. Although the record does not contain a copy of the Board's notice of denial, it can be inferred from the applicant's request for a hearing, dated January 30, 1989 (Exhibit #5), and the Notice of Hearing filed by the Department of Regulation and Licensing, Division of Enforcement, dated March 31, 1989, that the application was denied under sec. 448.05 (1)(a) and/or sec. 448.06 (2) Wis. Stats., based upon the applicant's court-martial record.

At the start of the hearing, the parties requested that the hearing be held open for two weeks for the purpose of submitting two additional documents. One of the documents related to the authenticity of Exhibit #6. The complainant, by its attorney, John R. Zwieg, requested an opportunity to confirm the authenticity of Exhibit #6, and to file objections, if appropriate. On June 20,1989, Mr. Zwieg filed a letter indicating that he had confirmed the authenticity of Exhibit #6, and that he did not wish to file objections relating to the admission of the document. The second document related to a psychiatric examination of Dr. Haser completed by or at the request of Dr. Gil Hefter, in conjunction with Dr. Haser's application for admission into a residency program at the University of Illinois. The document relating to Dr. Hefter's examination of Dr. Haser has not been filed with this examiner, as of this date (refer to Transcript, p.8-10; p.16, lines 1-8; p.40-42).

On January 15,1990, Dr. Haser filed a letter written by Dr. Cavanaugh which provides additional information regarding Dr. Haser's treatment. The complainant filed a letter, dated January 25,1990, which indicated that the complainant did not have any objections to the admission of Dr. Cavanaugh's letter, (refer to Exhibit #7).

II. LEGAL ANALYSIS

A. Licensure Requirements

Section 448.05 (1)(a) Wis. Stats., states that to be qualified for the grant of any license or certificate by the board, an applicant must, subject to ss. 111.321, 111.322 and 111.335, not have an arrest or conviction record.

Section 448.06 (2) Wis. Stats., provides that the Medical Examining Board may deny an application for any class of license or certificate and refuse to grant such license or certificate on the basis of unprofessional conduct on the part of the applicant. Section MED 10.02 (2)(r) Wis. Adm. Code provides that conviction of any crime which may relate to practice under any license constitutes unprofessional conduct.

B. Criminal Convictions

1. Determination

Based upon a review of several federal statutes containing various provision with respect to crimes and offenses by persons in the Armed Forces, it can be concluded that, in this case, a finding by the courts-martial that the applicant was guilty of the offenses set forth in the Findings of Fact, constituted a criminal conviction.

2. Analysis

(a) Definition - Conviction of Crime

Sec. 448.05 (1) (a) Wis. Stats., refer specifically to "conviction record", and sec. MED 10.02 (2)(r) Wis. Adm. Code refers specifically to "conviction of any crime".

Chapter 448 Wis. Stats., does not define what constitutes a "conviction record", nor does the statute define the term "conviction".

The Wisconsin Criminal Procedure Code, sec. 972.13 (1) Wis. Stats., provides that a "judgment of conviction" shall be entered upon a verdict of guilty by the jury, a finding of guilty by the court in cases where a jury is waived, or a plea of guilty or no contest.

Section 111.32 (3) Wis. Stats., provides, for purposes of Ch. 111 Stats., that a "conviction record" is defined to include, but is not limited to, information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned or paroled pursuant to any law enforcement or military authority.

(b) Military Courts-Martial

The chief military tribunal is the court-martial. A court-martial is a court of special or limited jurisdiction. General courts-martial have jurisdiction to try persons subject to the Uniform Code of Military Justice, for any offense made punishable thereunder, and may adjudge any punishment not forbidden thereby. A court-martial is not an independent instrument of justice, but is to a significant degree a specialized part of the overall mechanism by which military discipline is preserved. While courts-martial may and do discharge judicial functions, and are therefore, in a certain sense courts, they are not part of the judiciary branch of the government, but may perhaps more properly be classed as an agency belonging to the executive branch of the government.

The federal statutes contain various provisions with respect to crimes and offenses by persons in the Armed Forces, most of which are contained in the Uniform Code of Military Justice (refer to 10 USC sec. 801 et seq.). The Code contains a list of punitive articles detailing offenses under the Code and generally providing for punishment as a court-martial may direct, as well as with the convening, composition, jurisdiction, and procedure of courts-martial.

The Uniform Code of Military Justice also contains various provisions with respect to the sentencing and punishment of persons upon conviction by a court-martial, and provides detailed tables of maximum punishment for a large number of specific violations of the Code. In a proper case, the sentence may include dismissal or dishonorable discharge from the service, in addition to the other punishment imposed. The amount or extent and the character of the punishment are left to the discretion of the court-martial in most cases.

Offenses against the military law may or may not be criminal offenses, depending on whether the acts which constitute a violation of military law are also a violation of the local criminal code. 54 Am.Jur.2d Military and Civil Defense, secs. 216,218, 225-226, 254.

(c) Courts-Martial Convictions

Section MED 10.02 (2) (r) Wis. Adm. Code, provides that a certified copy of a judgment of a court of record showing a conviction, within this State or without, shall be presumptive evidence of a conviction. In this case, a copy of the judgment of conviction was not offered into evidence; therefore, a determination must be made regarding whether a finding of guilty in this case by the courts-martial constituted a criminal conviction.

Dr. Haser testified at the hearing that in November, 1987, he provided medical care and treatment to a twenty-one year old female patient at the Tripler Army Medical Center. Dr. Haser stated that while performing a urethral dilation on the patient, he massaged the patient's inner thighs and touched the area surrounding the patient's vagina. Dr. Haser testified that while providing medical care to the patient in December of 1987, he massaged the patient's back and buttock, and that he engaged in exhibitionistic behavior (in the presence of the patient). Dr. Haser further testified that in December, 1987, he provided medical care and treatment to a second female patient at Tripler Army Medical Center, and that while listening to the patient's heart, he touched the nipple of the patient's breast with his thumb.

Dr. Haser further testified that he pled guilty to, and was found guilty of, one count of indecent exposure and three counts of indecent assault; that he was ordered to serve eight months of confinement at Fort Leavenworth, of which he served seventy-eight days, and thereafter was released because his sentence was commuted; that he was dismissed from the Army, and that he forfeited all pay and allowances. (Transcript, p.18-19; p.27-29; Exhibit #1). Dr. Haser's testimony regarding his conviction is relevant from a factual standpoint; however, such testimony does not establish that the courts-martial finding of guilty constituted a criminal conviction.

Based upon a review of several federal statutes containing various provisions with respect to crimes and offenses by persons in the Armed Forces, it can be concluded that, in this case, the courts-martial finding of guilty constituted a criminal conviction.

First, although the Uniform Code of Military Justice does not specifically identify "indecent exposure" nor "indecent assault" as offenses, the Code does refer to the offenses in the "Table of Maximum Punishment", which sets forth the maximum punishment that may be imposed for specific offenses identified in the Code. The offenses "indecent exposure of person" and "indecent assault" are listed in the Table as offenses under Article 134. (Refer to 10 USC, sec. 856). Article 134 of the Code (10 USC, sec. 934) reads as follows:

> Art. 134. General article.
> Though not specifically mentioned in this chapter (10 USC secs. 801 et seq.), all disorders and neglect to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter (10 USC secs. 801 et seq.) may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

The Table provides that the maximum punishment for the offense "indecent assault" is confinement at hard labor not to exceed 5 years, dishonorable discharge and forfeiture of all pay and allowances. The maximum punishment for the offense "indecent exposure of person" is confinement at hard labor not to exceed 6 months. It is clear from the type of punishment provided for in the Table for these two offenses, indecent assault and indecent exposure of person, the Code contemplates that such violations are criminal in nature and that a criminal conviction is to be obtained prior to the imposition of such punishment.

Second, as noted earlier, offenses against the military may or may not be criminal offenses, depending on whether the acts which constitute a violation of military law are also a violation of the local criminal code.

In this case, the applicant was stationed in the State of Hawaii at the time he committed the offenses for which he was court-martialed. It is clear from a review of the Hawaii Penal Code that the offenses for which the applicant was court-martialed are crimes in the State of Hawaii.

A review of Title 37, sections 707-736 to 707-738, of the Hawaii Penal Code indicates that prior to 1986, the offense "indecent exposure" was classified as a "petty misdemeanor", and that although the offense "indecent assault" was not specifically referred to in the statute as a crime, the elements of the crime "sexual abuse in the first degree" corresponds to the type of conduct which is present in cases involving indecent assault. In 1986, the statutes relating to sexual offenses, including sections 707-736 and 707-738, were repealed, (refer to Act 314, Sessions Laws, 1986, sec. 56). Act 314, created new statutory provisions relating to sexual offenses, which were identified as sexual assault in the first, second, third, fourth and fifth degree. According to the testimony of Dr. Haser, it can be concluded that the type of conduct involved in the crimes "sexual assault in the fourth degree", and "sexual assault in the fifth degree" is the same type of conduct involved in the offenses "indecent assault" and "indecent exposure" (for which Dr. Haser was court-martialed). The Hawaii statute relating to sexual assault in the fourth and fifth degree reads as follows:

707-733 Sexual assault in the fourth degree. (1) A person commits the offense of sexual assault in the fourth degree if: (a) The person knowingly subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion: or (b) ...

(2) Sexual assault in the fourth degree is a misdemeanor.

707-734 Sexual assault in the fifth degree. (1) A person commits the offense of sexual assault in the fifth degree if, the person intentionally exposes the person's genitals to a person to whom the person is not married under circumstances in which the person's conduct is likely to cause affront or alarm.

(2) Sexual assault in the fifth degree is a petty misdemeanor.

707-700 Definitions of terms in this chapter. "Compulsion" means absence of consent, or a threat, express or implied, that places a person in fear of public humiliation, property damage, or financial loss. "Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

In addition to the two statutes referred to above, the Hawaii Penal Code also contains a provision which prohibits "open lewdness". Section 712-1217 of the Hawaii Penal Code, provides that a person commits the offense of open lewdness if in a public place he does any lewd act which is likely to be observed by others who would be affronted or alarmed, and that such offense constitutes a petty misdemeanor. This statute is relevant because intentional exposure of a person's private parts has been found to be a violation of the statute.

Third, it can be concluded that the applicant's conduct in committing the offenses for which he was court-martialed, constituted a criminal violation, based upon the applicability of the Assimilative Crimes Act (18 USC sec.13) to Article 134 of the Uniform Code of Military Justice. The Assimilative Crimes Act reads as follows:

> Sec. 13. Laws of States adopted for areas within federal jurisdiction. Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title (18 USC sec. 7), is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

The purpose of the Assimilative Crimes Act is to provide punishment in the federal courts, as an offense against the United States, of offenses committed within federal enclaves, but only in the way and to the extent that the offense in question would have been punishable if the enclave in which the offense was committed had remained subject to the jurisdiction of the state. Prosecutions under the Act are not to enforce the laws of the state, territory or district, but to enforce federal law, the details of which, instead of being recited, are adopted by reference. 21 Am.Jur. 2d, Criminal Law, sec. 356.

In this case, because the applicant was stationed in Hawaii at the time he committed the offenses, the Hawaii Penal Code in effect at that time would have governed his conduct; therefore, such conduct would have been a violation of the Assimilative Crimes Act (which in essence adopted the Hawaii statute by reference). There is legal authority which indicates that persons in the armed forces who violate the Assimilative Crimes Act are subject to prosecution under Article 134 of the Military Code of Justice, and that the imposition of punishment resulting from such prosecutions is governed by applicable state law. United States v. Stellars (1977, ACMR), 5 MJ 814; United States v. Chavez (1978, ACMR), 6 MJ 615; United States v. Picotte, 12 USCMA 196, 30 CMR 196 (1961).

C. Relation of Conviction to Practice

1. Determination

Based upon a review of Chapters 448, and 111, Wis. Stats., and relevant case law in Wisconsin, it can be concluded that in having been convicted of the crimes set forth in the Findings of Fact herein, the applicant has been convicted of crimes which substantially relate to the practice of medicine and surgery.

2. Analysis

As noted earlier, Ch. 448 Wis. Stats., provides that the board may deny a license based upon criminal conviction, subject to sec. 111.321, 111.322 and 111.335 Wis. Stats.

Sections 111.321, and 111.322 Wis. Stats., prohibit a licensing agency from refusing to license an individual on the basis of a conviction record. Section 111.335 (1)(c) (1) Wis. Stats., provides that notwithstanding sec. 111.322, Wis. Stats., it is not discrimination because of conviction record to refuse to license any individual who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular licensed activity.

Section 111.32 (3) Wis. Stats., defines "conviction record" to include, but is not limited to, information indicating that an individual has been convicted of any felony, misdemeanor or other offense, has been adjudicated delinquent, has been less than honorably discharged, or has been placed on probation, fined, imprisoned or paroled pursuant to any law enforcement or military authority.

In order to assess the "circumstances of the offenses" for which the applicant was court-martialed, one must apply the test established by the Wisconsin Supreme Court, in County of Milwaukee v. Labor & Industry Review Commission, 139 Wis.2d 805, 407 N.W.2d 908, 1987. The Supreme Court in County of Milwaukee, stated that a proper inquiry into to the "circumstances" of the offenses for which a person is convicted should focus on whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed. The Court stated that it is the "circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person" which are relevant in a proper "circumstances" inquiry. The Court rejected an interpretation of the test which would require, in all cases, a detailed inquiry into the facts of the offense and the job (in this case the licensed activity), and stated that a full-blown factual hearing is not only unnecessary, it is impractical. The Court stated that focusing on the elements of the offense helps to elucidate the circumstances of the offense.

In this case, a review of the elements of the offenses for which the applicant was convicted, indecent assault (sexual assault in the fourth degree under the Hawaii Penal Code), and indecent exposure (sexual assault in the fifth degree) indicates that the offenses involve conduct of a nature which is likely to reappear in a related context. (Note: Technically, since the applicant was convicted of a violation of Article 134 of the Uniform Code of Military Justice, there were additional elements regarding his conduct which should have been established prior to a finding of guilty; namely, that he committed "disorders and neglect to the prejudice of good order and discipline in the armed forces", and/or "engaging in conduct of a nature to bring discredit upon the armed forces". In this case, only the factors relating to indecent exposure and indecent assault will be analyzed.)

In analyzing whether the circumstances of the offenses for which the applicant was convicted reveals that the applicant's tendencies and inclinations to behave a certain way in a particular context is likely to reappear in a related context, it is important to consider two important factors; namely, the Board's interest in protecting the public, and the likelihood of the applicant engaging in repetitive criminal behavior.

First, in reference to protection of the public, the Wisconsin Supreme Court in County of Milwaukee, supra, discussed the legislature's attempts to balance the competing interests of society and of the individual who has been convicted of a crime. The Court stated, at p. 821, that:

> It is evident that the legislature sought to balance at least two interests. On the one hand, society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against .... On the other hand, society has an interest in protecting its citizens. There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.

The Wisconsin Supreme Court further stated, at page 823, in County of Milwaukee, supra, that:

> In balancing the competing interests, and structuring the exception, the legislature has had to determine how to assess when the risk of recidivism becomes too great to ask the citizenry to bear. The test is when the circumstances, of the offense and the particular job, are substantially related.

It is apparent from the Wisconsin Supreme Court's discussion in County of Milwaukee, that the protection of the public is of great importance when determining whether the circumstances of an offense substantially relate to a particular job or to the practice of a profession.

Second, in reference to the rehabilitation of the convicted person, the Wisconsin Supreme Court, in County of Milwaukee, supra, stated, at pages 823-824, that the purpose of inquiring into the "circumstances of the offense" is to assess whether the tendencies and inclinations to behave a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed. The Court stated that the legislature has clearly chosen not to force such attempts at rehabilitation where experience has demonstrated the likelihood of repetitive criminal behavior.

In this case, the applicant presented evidence for purposes of establishing the likelihood of successful rehabilitation, and to show that the possibilities of repetitive criminal behavior are minimal or non existent.

In reference to rehabilitative efforts, Dr. Haser testified that from March, 1988 to June, 1988, he saw Dr. Jack S. Annon, a psychologist, for purposes of obtaining treatment for his behavior relating to the two female patients which he saw at Tripler Army Medical Center in November and December of 1987; to provide information for purposes of providing Dr. Annon with a basis for rendering an opinion at the court-martial proceeding regarding the applicant's behavior, and to obtain an opinion from Dr. Annon regarding the probability of applicant's behavior re-occurring.

The evidence shows that at the time Dr. Annon saw the applicant, in 1988, Dr. Annon practiced as a Clinical Psychologist in Honolulu, Hawaii. Dr. Annon submitted an interim report, dated May 9,1988, to the Commander of the Tripler Army Medical Center, which stated that at the time Dr. Haser saw the two female patients at the Medical Center in November and December of 1987, his "symptomatology most closely fell within the abnormal diagnostic categories of the paraphilias: Exhibitionism, and Voyeurism, with features of Frotteurism" (refer to Exhibit #2). Dr. Annon stated in the report that the applicant's treatment program which he formulated was directed toward three areas: (1) cognitive-thinking; (2) overt-behavioral; and (3) affective-emotional. Dr. Annon's report stated that the treatment phase should last about a year, and that the applicant had a highly favorable prognosis for a lasting change regarding his abnormal behavior.

Dr. Annon testified at the court-martial proceeding in June, 1988, stating that the probability of applicant engaging in similar behavior in the future was very low. Dr. Annon stated that he estimated that it was more than a 95% chance that the applicant would not engage in the behavior again; provided that the applicant continued to follow the various strategies that were set out by Dr. Annon and under the required conditions. (Transcript p.20, lines 23-25; p.21, 27).

According to Dr. Haser's testimony, he saw Dr. Ashok Bedi in October, 1988. At the time the applicant saw Dr. Bedi, in October,1988, Dr. Bedi practiced psychiatry in Wauwatosa, Wisconsin. Dr. Bedi, submitted a report, dated October 11,1988, to the Medical Examining Board regarding the applicant's psychiatric evaluation and consultation. (Exhibit #4). Dr. Bedi stated in his report that the diagnostic impression was that the applicant had a history of exhibitionism, voyeurism and frotteurism. Dr. Bedi recommended that the applicant see Dr. Jon Meyer, a psychiatrist and a specialist in sexual disorders, for further assessment, recommendations and treatment as needed. Dr. Meyer referred applicant to Dr. David Black,(Dr. Haser saw Dr. Black at least 5 times between October and December of 1988).

On or about December 30, 1988, Dr. Haser saw Dr. James L. Cavanaugh, Jr., a psychiatrist. At least as of January 19,1990, Dr. Cavanaugh was the Director of the Department of Psychiatry at the Rush Presbyterian-St. Luke's Medical Center in Chicago, Illinois. At least as of June 2, 1989, Dr. Cavanaugh saw the applicant approximately every three to four weeks. In conjunction with Dr. Cavanaugh's treatment, applicant saw Dr. Jack Green, a psychologist, at least once a week.

Dr. Cavanaugh stated in correspondence dated February 20,1989, that (as of that date) the applicant had been completely successful in the elimination of voyeuristic and exhibitionistic behaviors since his release from the Army. (Exhibit #6). Dr. Cavanaugh stated in the correspondence that Dr. Green saw the applicant weekly, and that Dr. Green emphasized the combination of behavioral modification programs designed in Honolulu by Dr. Annon. Dr. Cavanaugh stated that if the applicant presented indications that he was having difficulty controlling sexual deviant impulses or behaviors, the applicant had already agreed to be placed on antiandrogens (medroxyprogestrone acetate) intramuscularly to reduce circulating serum testosterone levels. Dr. Cavanaugh stated that the applicant also agreed that MPA (Depo Proversa) could be added to his treatment regimen.

At some point in time, between the time applicant saw Dr. Black and the time the applicant saw Dr. Cavanaugh on December 30, 1988, applicant saw at least four other psychiatrists and/or psychologist for purposes of treatment.

Based upon the evidence contained in the record, Dr. Haser has not sufficiently established that he has been rehabilitated or that there is a reasonable likelihood that he will be rehabilitated. Dr. Cavanaugh's statement in his January 19,1990, letter (refer to Exhibit #7), that he is "confident" that Dr. Haser will not have "future episodes of dysfunction" is not sufficient evidence upon which to base a conclusion regarding the possibilities of Dr. Haser not engaging in repetitive criminal behavior.

Dr. Cavanaugh's January 19,1990, letter does not indicate that Dr. Haser has been rehabilitated or that Dr. Haser has successfully completed the treatment phase, which according to Dr. Annon, the treatment phase should last about a year (Dr. Cavanaugh's letter indicated that he had been treating Dr. Haser for over a year).

In addition, Dr. Cavanaugh's earlier statements, in his February 20, 1989, letter (Exhibit #6), that Dr. Haser had agreed to be placed on antiandrogens, which according to Dr. Cavanaugh would be an "investigational use", and that he would add MPA (Depo Provera) to Dr. Haser's treatment "immediately" if required, indicate that Dr. Haser had not been rehabilitated, and that Dr. Cavanaugh's treatment of Dr. Haser may not result in Dr. Haser's rehabilitation.

Finally, Dr. Cavanaugh stated in his February 20,1989 letter (Exhibit #6), that given the two specific clinical situations with young female patients that resulted in Dr. Haser's court-martial, he would recommend that Dr. Haser "initially be required to not see young female patients alone (i.e. only with a nurse in attendance; only with another physician in attendance, etc.)". Dr. Haser testified at the hearing that he would "feel more comfortable having a chaperone at all times when examining ... any female patients, at least initially for a year or so depending on how things go." The statements of Drs. Cavanaugh and Haser regarding Dr. Haser's treatment of female patients in the present of a "chaperone" indicate that they are not convinced that Dr. Cavanaugh's current treatment program will result in Dr. Haser's rehabilitation. In addition, Dr. Haser stated in his application (Exhibit #1) that he is "committed to continue maintenance therapy throughout my life", and he stated in his request for a hearing document (Exhibit #5), that he is "prepared to submit contractual documents which state that I will never see a female patient without a chaperone while practicing medicine in the State of Wisconsin". The question which still remains unanswered is how long will Dr. Haser need a "chaperone"?

It may be determined sometime in the future that Dr. Cavanaugh's treatment program is the most appropriate program for treating Dr. Haser's condition, and the treatment may eventually result in Dr. Haser's rehabilitation; however, based upon the evidence, this examiner cannot conclude at this time that Dr. Haser has been rehabilitated; that there is a likelihood that he will be rehabilitated, or that Dr. Haser will not engage in repetitive criminal behavior.

D. Exercise of Discretionary Power

Section 448.06 (2) Wis. Stats., provides that the Medical Examining Board may deny an application for any class of license or certificate and refuse to grant such license or certificate on the basis of unprofessional conduct on the part of the applicant.

Discretion may be defined, when applied to public functionaries, as the power or right conferred upon them by law of acting officially under certain circumstances, according to the dictates of their own judgment and conscience, and not controlled by the judgment or conscience of others. The very essence of discretionary power is that the person or persons exercising it may choose which of several courses will be followed. 2 Am.Jur. 2d. Administrative Law sec. 83.

Generally speaking, the only restraint upon the exercise of discretion by an administrative agency is that it act in good faith and not in abuse of its discretion. Discretion must be exercised according to fair and legal considerations, in accordance with established principles of justice and not arbitrarily or capriciously, fraudulently, or without factual basis. 2 Am.Jur. 2d. Administrative Law, sec. 192.

Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning which depends on facts that are of record or reasonably derived by inference from the record, and a conclusion based on a logical rationale founded on proper legal standards. The record must show that discretion was in fact exercised. Madison Gas & Electric Co., v. Public Service Commission, 109 Wis.2d 127, 137, 325 N.W.2d 339 (1982); Reidinger v. Optometry Examining Board, 81 Wis.2d 292, 297, 260 N.W. 2d 270 (1971); McCleary v. State, 49 Wis. 2d 263, 277, 182 N.W. 2d 512 (1971).

The purpose of licensing statutes is not to benefit those persons licensed to practice under the statute, but rather to protect the public by the requirement of a license as a condition precedent to practicing in a given profession. Occupational licensing requirements follow a legislative determination that the public's health and safety require protection from "incompetent practitioners". Gilbert v. Medical Examining Board, 119 Wis.2d. 168, 188, 349 N.W. 2d 68 (1984); Laufenberg v. Cosmetology Examining Board, 87 Wis.2d 175, 184, 274 N.W. 2d 618 (1979).

In this case, the legislature has imposed a specific requirement under sec. 448.05 (1)(a) Wis. Stats. (by reference to Ch. 111 Wis. Stats.), that the Medical Examining Board consider certain factors, including protection of the public, in determining whether to grant a license to a person who has a conviction record. In my opinion, the Board's analysis of the same factors which it must consider in arriving at a decision under sec. 448.05 (1)(a) Wis. Stats., and its decision based upon such analysis, is sufficient to show a proper exercise of discretionary power under sec. 448.06 (2) Wis. Stats.

III. CONCLUSIONS

In conclusion, based upon the facts presented in this case and upon the legal authority cited herein, it must be concluded that the applicant, Paul B. Haser, has not established that he has met the qualifications for the grant of a license to practice medicine and surgery as required by Ch. 448 Wis. Stats.; therefore, this examiner recommends that the application of Paul B. Haser, M.D., to practice medicine and surgery be denied.

Dated this 20th day of July, 1990.

Respectfully submitted,

Ruby Jefferson-Moore

Ruby Jefferson-Moore
Hearing Examiner